SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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October Term, 1969
No. 386

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 94, AFL-CIO; and AUTOMOTIVE MARINE, PRODUCTION FINISHERS, EQUIPMENT, MAINTENANCE AND PUBLIC SERVICE PAINTERS LOCAL UNION 1798, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondents,

LOU EHLERS CADILLAC and THOMAS CADILLAC, INC.,

Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF INTERVENOR LOU EHLERS CADILLAC IN OPPOSITION.

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BRIEF OF INTERVENOR LOU EHLERS CADILLAC IN OPPOSITION.

STATEMENT OF THE CASE.

In the proceeding below, the General Counsel and the Unions contended that Ehlers was a successor to GM. Under the doctrine of successorship, if the purchaser of a business operates the same business as that of the seller without significant change, including employee complement, he is regarded as a successor. The exclusive bargaining agent of the seller's employees is generally presumed under such circumstances to also be

the exclusive bargaining agent of the successor's employees. This presumption is grounded upon the reasonable assumption that where the only significant change is that of a different employer, the employee desires as to union representation would continue when they became employees of the new employer.

This presumption, however, is rebuttable. If rebutted, or if there are circumstances which justify the successor's good faith doubt that his employees desired representation by the union, then the union must demonstrate support by the majority of the successor's employees in the appropriate bargaining unit before the successor has any duty to bargain with it.

The Board found, and the Court of Appeals concurred, that Ehlers was not a successor to GM. In view of this finding the Board did not consider Ehlers' other defenses, based on the assumption there was a successorship, the principal ones being: (1) Under the circumstances here present, including the fact that the GM unit was a multiplant unit whereas Ehlers only operated at Wilshire, no presumption ever arose that the Unions were the exclusive bargaining agent of Ehlers' employees; (2) Assuming such a presumption did arise, it was effectively rebutted by many circumstances, including the fact that a majority of GM's shop employees at Wilshire had voted against representation by the Machinists; (3) The alleged bargaining units were inappropriate, praticularly by failure to include all the shop employees in a single unit and by claiming the painters were a proper separate unit.

In view of the finding that there was no successorship, and in the absence of any evidence that a majority of Ehlers' employees desired representation by the

Unions, the Board necessarily concluded that the Unions were not the exclusive bargaining agent of Ehlers' employees. Accordingly, Ehlers had no duty to bargain with the Unions, so Ehlers did not violate Section 8(a)(5) of the National Labor Relations Act [29 U.S.C. § 158(a)(5)] by refusing to bargain with the Unions.

Apparently the Unions have finally reluctantly accepted the fact that Ehlers was not a successor to GM. At least that is our understanding of their Petition. Hence we do not argue herein the issue of successorship, nor in our Summary of Facts have we set forth to any great extent the circumstances demonstrating there was no successorship.

The Unions now make a different claim. The Unions no longer assert that they are, or were, the exclusive bargaining agent of Ehlers' employees. Instead, the Unions have advanced a new and novel contention that, briefly, Ehlers had a limited duty to bargain with them relative to the possible hiring of GM employees and it refused to so bargain.

A more accurate version of the Union's statement of the new "Question Presented" (Pet. 2) would be as follows:

> Whether Section 8(a)(5) imposes the duty upon the prospective purchaser of some of the assets of one branch of a business prior to the time it begins operations to negotiate with the certified bargaining agent of the prospective seller's employees in a multibranch unit as to the hiring of all or some of the prospective seller's employees?

The contention of the Unions, as we discuss hereinafter, could only be sustained by a change in the law.

SUMMARY OF FACTS AND PROCEEDINGS.

Throughout this brief we will refer to Petitioner International Association of Machinists, District Lodge 94 as the "Machinists" or "Union" and Petitioner Automotive, Marine, Production Finishers, Equipment, Maintenance and Public Service Painters Local Union 1798 as the "Painters", and jointly as the "Unions". The Petition for Writ of Certiorari will be cited merely as "Pet." and the Appendix thereto as "Pet. App.". The Intervenor Lou Ehlers Cadillac will be referred to herein as "Ehlers". The printed Joint Appendix of the parties before the Court of Appeals will be cited as "Jt. App.". The transcript of the record of the hearings before the National Labor Relations Board (hereafter "NLRB") will be cited as "Tr." Exhibits before the Labor Board that have not been printed in the Joint Appendix will be referred to as "G.C. Exh.", or "R.E. Exh.", for exhibits of the General Counsel or of Ehlers, respectively.

The facts were not in dispute, so there was no conflict in the evidence and no problems of resolving credibility. Since there was no dispute on the facts, to expedite the proceeding the parties introduced the evidence in the easiest manner possible. Thus, they submitted, mostly without objection, depositions in other proceedings, affidavits, unsworn written statements, hearsay, and conclusionary statements. There were relatively few objections to any of the exhibits or testimony. No Exceptions were filed by any of the parties to the Trial Examiner's rulings on the evidence.

In its Statement of the "Board's Findings of Fact" [Pet. 3-12], the Unions refer to and quote from the findings by the Trial Examiner. These findings, how-

ever, to a great extent were inconsistent with the Board's findings, and in this connection the Board adopted "only those findings, conclusions, and recommendations of the Trial Examiner consistent with this Decision and Order" (Pet. App. 15).

In our argument we will refer back to the following summary of the facts by paragraph number.

A. General Motors.

1. General Motors (hereinafter "GM") is the world's largest private corporation, with a number of auto plants and other facilities in the Los Angeles area [Jt. App. 936, 972, 312-313; R.E. Exhs. 7, 8]. In 1949, GM, through its Cadillac Motor Car Division, opened in the central business district of Los Angeles on Seventh Street at the corner of Bixel (hereinafter "Bixel") a branch retail sales outlet for the sale of Cadillac cars, parts, and accessories and the servicing of such vehicles [Jt. App. 214-215]. In 1954, GM opened a sub-branch of its Cadillac Los Angeles retail branch on Wilshire Boulevard (hereinafter "Wilshire") [Jt. App. 214-215]. In addition, GM also operated, as a part of its Cadillac Los Angeles sales branch, a used car lot on Vermont (hereinafter "Vermont") [Jt. App. 206-207].

2. The Wilshire operation was not self-sufficient, but was integrated with the Los Angeles retail branch operations at Bixel and Vermont [Jt. App. 206-221, 225-233, 297-300, 309, 311, 316, 438-439, 577, 580, 940-941, 1123]. It was but a sub-branch of the main Bixel location which was the primary operation of the Los Angeles retail branch [Jt. App. 299]. The branch manager, controller, used car manager, personnel manager, credit manager, and other management personnel

were located at Bixel [Jt. App. 206, 209-211, 216]. The accounting, personnel, and other functions were centralized at Bixel for all three locations, and the Bixel shop was the dominant shop [Jt. App. 206-207, 212-213, 216, 226]. The Los Angeles retail branch, moreover, was subject to direction and control from Detroit [Jt. App. 209, 217-219]. This was particularly true in the critical area of labor relations [Jt. App. 636, 937, 941, 948, 951, 952, 970-974, 989-991, 1075, 1123-1124]. A number of the Los Angeles retail branch managers and executives were in fact on a GM Detroit payroll [Jt. App. 213].

3. Cadillac retail sales in the Los Angeles area were made primarily through some 14 independent franchised dealers [Jt. App. 1118]. GM as a manufacturer did not depend on a retailer's profit and did not seek through its Los Angeles branch to compete with such franchised dealers either in the sale or service of Cadillacs [Jt. App. 219, 960].

4. Following a secret ballot election, on August 1, 1957, the NLRB certified the Machinists as collective bargaining agent of the mechanics, painters, and certain other shop employees of GM at both its Wilshire and Bixel locations in a single multi-plant unit [Jt. App. 1099-1100, 1104-1105]. In the NLRB election which preceded the certification, the Wilshire employees voted almost two to one against representation by the Machinists. However, the vote at the larger Bixel shop was two to one in favor of the Machinists with the consequence that the combined tally resulted in a majority vote for the Machinists [Jt. App. 1101-1105, 1135-1136]. This was the only opportunity the GM

employees at Wilshire ever had to express their desires relative to representation by the Machinists.[1]

5. On October 17, 1957, GM and the Machinists entered into a contract covering both the Wilshire and Bixel shops as a single unit [Jt. App. 945-947; G.C. Exhs. 19-C, 19-D].

6. On November 6, 1958, the Painters was certified by the NLRB as representative of the painters employed by GM at its Wilshire and Bixel shops in a multi-plant unit [Jt. App. 1107-1113].

7. GM then entered into a contract with the Machinists and Painters in a single unit on December 4, 1958 and renewal contracts on October 22, 1961 and December 1, 1964 [Jt. App. 948-956]. The 1964 contract, which by its terms was to be effective to December 1, 1967, consisted of eight documents totaling 276 pages [Jt. App. 577-639; G.C. Exhs. 6-D, 6-E, 6-F, 6-K, 6-L, 6-M]. This contract, as did each of the

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[1]Theoretically, the employees at Wilshire could have filed a decertification petition near the termination of the union contract in 1951 and 1954. But this practically could not be expected. So long as the larger majority of the employees at Bixel desired Machinists representation, the Wilshire employees could not achieve decertification. This is so since a decertification election would have to be held in the multiplant unit, including Bixel. *Pet Dairy Products Co.*, 118 NLRB 1562 (1957); *cf. General Motors Corp.*, 120 NLRB 1215 (1958).

Further, since the employees at Wilshire were required by the contract to be members of the Union, it would take an unusually brave and daring employee to undertake a decertification move against the very Union of which he was a member. Union pressures and intimidation against such an employee are commonplace. Further, the employee would make himself subject to union penalties. *Price v. NLRB*, 373 F. 2d 443 (9th Cir. 1967); *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965); *cf. NLRB v. Allis-Chalmers Mfg Co.*, 338 U.S. 175 (1967). Finally the employee would run the risk of being discharged by his employer for such action. See *Midtown Service Co.*, 171 NLRB No. 161, 69 LRRM 1057 (1968).

prior contracts, contained a union shop clause [Jt. App. 315-316, 589; G.C. Exh. 19-C]. Thereunder, seniority was based on combined length of service at both Bixel and Wilshire [Jt. App. 599, 602]. The agreement was patterned to some extent upon GM's national agreement with the United Automobile Workers [Jt. App. 1013-1018, 1022], and in some situations seniority accrued while working at other GM facilities [Jt. App. 607]. The holiday pay, vacation pay, and paid absence benefits and eligibility were based on length of employment in any GM facility [Jt. App. 612-613, 620, 623, 624]. The contract included the GM national hourly pension plan, insurance program, and income security plan, under which eligibility and benefits were based on length of service with GM anywhere [G.C. Exhs. 6-D, 6-E, 6-F, 6-K, 6-L, 6-M].

8. GM determined early in 1965 to discontinue operation of its own retail Cadillac stores in California. Through Pais, the Assistant Personnel Director of Cadillac in Detroit [Jt. App. 934], GM had meetings with the Unions on January 12, 1965 and April 12, 1965 concerning the anticipated closing of its Los Angeles Cadillac retail branch, and wrote the Unions on January 21, 1965 and March 26, 1965 concerning meetings "to discuss and explore the possible effects and any problems that might be associated with such change" [Jt. App. 958-969, 1075-1079]. On April 14, 1965 Pais met with the Unions' officials and shop committee to further discuss the situation [Jt. App. 969-973]. This resulted in a written agreement, the Supplemental Agreement of April 28, 1965, which provided (in anticipation of the closing of the retail branch) that employees (to take another job) could take a voluntary

layoff out of line of seniority [Jt. App. 973-974, 1082-1083].

9. On May 10th, Pais informed the Unions orally and by letter of the names of independent dealers who would operate at Wilshire and Bixel after GM went out of the retail business [Jt. App. 966-967, 1081]. In any of such meetings, or otherwise, GM did not refuse to consider any proposals the Unions cared to make concerning their members, but the Unions did not at any time oppose GM's planned termination of its employees nor did they request that GM require the new dealers to hire GM's unit employees [Jt. App. 961, 973, 997-998, 1005-1006; R.E. Exh. 15].

10. On April 14, 1965, GM informed all its Los Angeles Cadillac retail branch employees that it was discontinuing that branch's operations as of May 28th [Jt. App. 974-975]. GM did cease all operations at its Los Angeles branch at the end of Friday, May 28, 1965, and all of its employees (except those who went to work for some other GM facility) were terminated by GM as of that date [Jt. App. 143, 145, 153-154, 161].

11. The GM employees were given their vacations and absence pay, prorated to the end of May [Jt. App. 1126-1127]. Most also elected to receive immediately their accumulations (paid by GM in amounts up to $1380) under the GM Income Security Plan, including 31 out of the 42 unit employees at Wilshire [Jt. App. 1127, 1130]. Such amounts were payable under the Plan in a lump sum only on final termination [G.C. Exhs. 6-F, 6-M]. Many employees, having reached the permissible retirement age and having the necessary minimum 10 years of service, were retired

under the GM pension plan, including 11 in the unit at Wilshire [Jt. App. 300-301, 999, 1127, 1129]. Pensions were allowed those between the ages of 55-60, though the minimum age for voluntary retirement under the hourly plan was 60 [Jt. App. 301, 999].

B. Ehlers.

12. Lou Ehlers had operated Buick dealerships in Milwaukee and Madison, Wisconsin for a number of years, which he was required to dispose of—and did as of May 15, 1965—as a condition of acquiring a Cadillac franchise in Los Angeles [Jt. App. 172-173, 428]. He believes, and practices, that a good automotive repair service is the prime source for obtaining new car customers. Hence, he has been a bear regarding quality workmanship, and was commended by Buick a number of times for the excellent service record at his Wisconsin dealerships [Jt. App. 173-174, 1116]. Lou Ehlers had a union in his Madison Buick shop, the United Auto Workers, for almost six years until he disposed of the agency [Jt. App. 199, 319]. Lou Ehlers is not opposed to collective bargaining, as witnessed by the excellent relations he had there with the UAW without any trouble of any kind [Jt. App. 199].

13. In his first discussion in Detroit in March 1965 about possibly obtaining a Cadillac dealership in Los Angeles, Lou Ehlers was advised that GM had a union agreement in its Los Angeles shop [Jt. App. 164, 168-169, 431]. At the same time, however, he was told that the contract would not be binding on him [Jt. App. 202, 431]. He was also subsequently so advised by his counsel [Jt. App. 202-203]. Lou Ehlers did not request GM to discharge its Wilshire employees [Jt. App. 161, 431, 995]

14. Ehlers is a small California family corporation, organized May 19, 1965, owned primarily by Lou Ehlers and his wife [Jt. App. 161, 180, 427].

15. Lou Ehlers entered into a buy and sell agreement with GM's Cadillac Division on May 12, 1965 to purchase, primarily, the fixed assets of GM at Wilshire after the end of May, 1965 and to sublease from GM the Wilshire premises [Jt. App. 432-433, 519-537]. Under the agreement, consummation of the transaction was conditional upon GM subsequently issuing a franchise to Ehlers [Jt. App. 441, 528]. Lou Ehlers then assigned this agreement to Ehlers on June 1, 1965 [Jt. App. 571]. The transaction was consummated as of that date by GM's bill of sale and an assignment, which were executed on June 7, 1965 [Jt. App. 537-553]. Also on June 1, 1965 GM issued a Cadillac dealer's franchise to Ehlers [Jt. App. 140-141, 649-714].

16. Ehlers' sublease from GM of its Wilshire premises did not cover the entire term under GM's lease with its lessor [Jt. App. 167-168, 440, 529]. Ehlers' sublease covered but 28 percent of the premises used by GM in its Los Angeles Cadillac retail branch operation [Jt. App. 190, 221-222, 313-314, 1120].

17. Ehlers' purchases from GM, all for cash, covered a number of the physical assets located at Wilshire, including furniture, fixtures, machinery, shop equipment, service cars, and special tools (capital items) for a price of $28,000, and miscellaneous inventory items for $20,139, the total being $48,139 [Jt. App. 1115]. The foregoing does not include the new Cadillacs and Cadillac parts and accessories acquired, which any dealer must acquire and therefore has no significance [Jt.

App. 163, 166, 183, 538], or the less than one week's acquisition of used cars [Jt. App. 166, 1127].

18. Because of the unsatisfactory condition of the Wilshire premises, Ehlers immediately undertook a major renovation program at a cost of $75,000 [Jt. App. 1641]. In addition, Ehlers had to immediately expend for additional equipment, furniture, non-factory inventory items, etc., the sum of $71,200 [Jt. App. 164-166]. These additional purchases and expenditures by Ehlers, totaling $146,200, were more than three times greater than its $48,139 in similar purchases from GM. Thus, Ehlers' purchases from GM constituted less than one-third of its immediate requirements. Ehlers' purchases from GM did not include any of the assets of GM used by it at Bixel or in connection with its Vermont used car lot [Jt. App. 169]. Hence, Ehlers acquired physical premises (by sublease) and assets amounting to less than one-third of those used by GM in its Los Angeles retail operation and the assets purchased from GM amounted to less than one-third of Ehlers' needs.

19. Ehlers did not purchase from GM any of its real property, non-trade accounts receivable, goodwill, customer lists, permits, licenses, trademarks, files, records, etc. [Jt. App. 147-150, 163, 499, 1127]. Ehlers did not acquire any of the monetary liabilities of GM's Los Angeles retail branch, amounting to many thousands of dollars [Jt. App. 1127-1129], nor did it assume any of the other obligations of GM, including its Union contract [Jt. App. 148, 168, 499].

20. Lou Ehlers was at the Wilshire location for a few weeks in May [Tr. 245]. He discovered that the GM operation was a most unsatisfactory and inefficient one, and that this was particularly true with reference

to the service shop. He heard numerous complaints from GM customers, service advisers, and salesmen that the shop service was very poor [Jt. App. 503, 508, 511-513]. He determined that his shop operation would have to be drastically improved from that of GM's and, accordingly, that he could not hire the GM work force intact [Jt. App. 170]. Following his policies in Wisconsin, he concluded he would put in effect the most favorable wages and salaries, and other conditions of employment, and recruit only the most qualified people, including the shop employees with the most diversified skills [Jt. App. 173, 189, 199, 479-480, 806].

21. Lou Ehlers was not personally qualified to determine the competency of GM's shop employees, so he asked the GM Service Manager, Baesemann, and a GM Wilshire foreman, Graham, each of whom had been highly recommended to him, to select the most competent and satisfactory of GM's unit employees without any limit as to the number they could recommend [Jt. App. 171, 194-195, 408, 806]. They, each acting independently, recommended to Ehlers the hiring of the same eleven GM employees as meeting Ehlers' requirements for versatility, experience, and workmanship [Jt. App. 175, 413-414, 479-481, 806], and all these eleven were so hired on May 28th [Jt. App. 407, 806].

22. Additional shop employees were hired by Ehlers during the same week from various sources [Jt. App. 163, 170, 490-491, 807]. All of the mechanics hired by Ehlers had received training at a GM school [Jt. App. 408, 409]. As found by the Board [Jt. App. 58-59] and the State court [Jt. App. 125], Ehlers selected its shop employees on the basis of skill and ability, without being influenced by union membership [Jt. App. 806].

Out of necessity, because of lack of time, Ehlers was compelled to hire most of its remaining staff from the former GM Wilshire employees on a probationary basis until it could determine which ones were qualified to be retained [Jt. App. 171-172, 193-194].

23. Ehlers commenced business on Tuesday, June 1, 1965 [Jt. App. 138, 161].[2] It purchased new Cadillacs from GM and sold the same at retail, operated a repair shop, and also undertook the leasing of Cadillacs, in competition with 15 other franchised Cadillac dealers in the area [Jt. App. 160, 178-180, 183, 1117]. Ehlers is a separate business distinct from GM. Thus, it had its own licenses, deposits, bonds, etc. [Jt. App. 174-175, 317-318]. Ehlers did not take over any of the contracts GM had with vendors of materials or service [Jt. App. 314-315]. Ehlers' vendors of services and materials are different from those used by GM [Jt. App. 186-188, 227, 318-319, 1126]. Ehlers maintains relations with banks, accountants, doctors, attorneys, insurance consultants, etc., different from those used by GM [Jt. App. 186, 204, 1125-1126].

24. Ehlers was required to pay a sales tax on the capital items purchased from GM because the transfer was not between related parties [Jt. App. 1115]. Ehlers was not allowed to take advantage of GM's lower unemployment insurance tax rate which it enjoyed because of its favorable experience [Jt. App. 175-176, 1126]. Payroll taxes paid by Ehlers or withheld from employee wages were computed (relative to the maximum annual taxable wage) without regard to prior earnings with GM [Jt. App. 176-177]. Ehlers' work-

[2]Ehlers finished the repairs on three cars left in the shop by GM [Jt. App. 311].

men's compensation insurance rate was not based on GM's experience but on Lou Ehlers' Milwaukee experience [Jt. App. 181, 263].

25. Ehlers' management, which included Lou Ehlers and two top managers who were with Ehlers in Milwaukee, was completely different from that of GM [Jt. App. 182, 317, 423-424, 449, 573]. Similarly Ehlers' supervisors of shop employees were substantially different from those of GM [Jt. App. 451, 573, 714-715]. In June of 1965, Ehlers had 87 employees, compared to 279 employed by GM in its Los Angeles branch. Fifty-four of those had formerly been employed by GM [Jt. App. 180-181, 1119, 1121]. Ehlers then had 35 shop "unit" employees, compared to 117 in GM's unit. Eleven of these had formerly been employed by GM [Jt. App. 1119, 1121]. These 11 constituted about 10 percent of the GM unit employees, about 25 percent of the 42 GM unit employees at Wilshire, and 31 percent of Ehlers' unit employees. By November of 1965, Ehlers had 93 employees, only 36 of whom had formerly been employed by GM, including 9 (or 23 percent) in Ehlers' unit of 40 [Jt. App. 1119].

26. Ehlers established its own salaries, wages, hours, and terms and conditions of employment which were different from and unrelated to those of GM and which were better than those found in most local automotive shops [Jt. App. 186-189, 198-199, 301-302, 400, 404, 406-407, 467, 478-479, 482, 485-490, 565-570, 608-633; G.C. Exh. 6-L].

27. Many of Ehlers' operation practices and procedures, involving also those in the shop, were significantly different from those of GM [Jt. App. 296-297, 301-302, 310-311, 395-397, 401-402, 414-416, 469-474,

479-485, 489], including substantial differences in the composition of the alleged bargaining unit [Jt. App. 145, 184, 296, 319-320, 398-399, 372, 403, 473, 1126].

28. Ehlers' only business is that of operating the dealership at Wilshire [Jt. App. 160, 183]. It has no connection with GM other than that of a sublessee of certain premises and that of a distributor of Cadillac products [Jt. App. 162]. The dealer's franchise issued to Ehlers was nonexclusive and in GM's standard form [Jt. App. 140-142, 649-714]. Thus, any control GM allegedly had over Ehlers [Pet. 8-9, 22] was no different than that GM had over its numerous other Cadillac dealers. Ehlers has no connection with Intervenor Thomas Cadillac, Inc. (hereafter "Thomas"); it is merely a competitor of Thomas, and its purchases and arrangements with GM were made completely independently of Thomas [Jt. App. 161-162, 224-225, 301, 425-434].

C. Ehlers' Relations With the Unions.

29. By letter of May 19, 1965 to Ehlers, received May 22, 1965, the Unions referred to their existing contract with GM and suggested to Lou Ehlers that he meet with them "to clarify the rights of the employees" of GM [Jt. App. 139, 642]. Before the letter was received, on May 20, 1965, the Union's counsel, Ansell, called Ehlers' counsel, Lund, regarding a meeting to discuss application of the GM union contract to Ehlers and possible recognition by Ehlers of the Unions as bargaining representatives. He was in turn advised that Ehlers did not and would not consider itself bound by GM's contract, that any question of recognition was

premature, and so that a meeting did not appear to be necessary at that time [Jt. App. 1131-1132]. There was another similar conversation on May 25th and one with the Painters' counsel, Geffner, on May 27th in which, in answer to an inquiry as to what the situation was as to the GM shop men to be hired, Lund advised that as of the moment it was uncertain which of the GM men would be hired [Jt. App. 1132-1133]. Then by letters of June 3rd and 8th, the Unions requested Ehlers to agree to submit to arbitration the alleged issue of whether the GM contract was binding on Ehlers, which requests were refused by Ehlers by letters of June 7th and 14th [Jt. App. 139, 643-648].

30. On June 9, 1965, the Unions began picketing Ehlers and continued such picketing until after the decision of the Labor Board herein [Jt. App. 156-157]. However, notwithstanding such picket lines, all the employees of Ehlers, including those who formerly worked for GM, continued at work [Jt. App. 156-157, 198, 319].

31. Ehlers had intended to file a representation petition with the Labor Board when and if the Unions claimed that a majority of Ehlers' employees desired union representation [Jt. App. 1134-1135].[3] The Unions, however, by the precipitous filing of unfair labor practice charges, prevented such an effective course because under Labor Board rules the pendency of such charges precludes the processing of an employer pe-

[3]An employer representation petition filed prior to a representation demand [*Raymond F. Schweitzer, Inc.*, 165 NLRB No. 84, 65 LRRM 1367 (1967); *Maclobe Lumber Co.*, 120 NLRB 320 (1958)] or prior to the hiring of a representative number of employees [*Cramet Inc.*, 112 NLRB 975 (1955); *cf. General Extrusion Co.*, 121 NLRB 1165 (1958)] would be dismissed.

tition.[4] Thus, Ehlers did not file such a petition because it "would have been futile" to do so [Jt. App. 1134-1135].[5]

32. On June 28, 1965, the Unions filed in the Los Angeles, California Superior Court an action against Ehlers to compel it to arbitrate several alleged issues under the GM union agreement, including a demand that it hire all of the GM shop employees [Jt. App. 98, 104-114]. On substantially the same record as that before the Labor Board [Jt. App. 99-100], the California Court on June 30, 1966 held that Ehlers was not a successor to GM and that the GM union contract was not binding on Ehlers and dismissed the suit [Jt. App. 121-129]. *Cooksey v. Lou Ehlers Cadillac*, 63 LRRM 2425.

D. Proceedings Below.

33. On June 3, 1965, the Painters, and on June 4, 1965, the Machinists filed unfair labor practice charges against Ehlers with the Labor Board, asserting that Ehlers had violated Section 8(a)(3) of the Act by refusing to hire GM employees and had violated Section 8(a)(5) by refusing to bargain with them [Jt. App. 327-329, 335-337]. The General Counsel found no merit in the Section 8(a)(3) charges and they were not included in the amended charges upon which the complaint was issued [Jt. App. 329-331, 337-339].

34. The General Counsel issued a Consolidated Complaint against Ehlers and Thomas [Jt. App. 339-357].

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[4]"The Board's policy of not conducting a representation election while unfair labor practice charges are pending has long met with court approval." *Furr's Inc. v. NLRB*, 381 F. 2d 562, 570 (10th Cir. 1967) *cert. den.* 389 U.S. 840 (1967).

[5]*Gulfmont Hotel Co.*, 147 NLRB 997, 1002 (1964) *enf'd* 362 F. 2d 588 (5th Cir. 1966).

The complaint alleged that Ehlers had been since June 1, 1965 the successor to Cadillac at Wilshire [Jt. App. 344-345], that since June 1, 1965 the Machinists had represented a majority of Ehlers' employees in a unit of, roughly, its shop employees and the Painters had similarly represented Ehlers' painters [Jt. App. 349, 352], and that Ehlers had refused to bargain with the Unions as the representatives of its employees [Jt. App. 350, 353] in violation of Section 8(a)(5). The complaint also alleged that Ehlers violated Section 8(a)(5) by refusing to honor or give effect to the contract between GM and the Unions [Jt. App. 351, 354].

35. Ehlers filed a motion to sever the complaint and proceedings as to it from those pertaining to Thomas [Jt. App. 379-381], which motion was denied [Jt. App. 389].

36. Following hearings, the Trial Examiner concluded that Ehlers was a successor to GM and had violated Section 8(a)(5) by refusing to bargain with the Unions and refusing to honor the GM union contract [Jt. App. 9-54; Pet. App. 24-64].

37. While the matter was pending before the Board on Ehlers' Exceptions [Jt. App. 88-97], Ehlers filed a motion with the Board to take judicial notice of the decision in the State court case [Jt. App. 97-129].

38. On March 29, 1968 the Board (by McCulloch, Chairman, Fanning, Zagoria, and Jenkins) unanimously found that Ehlers was not a successor to GM and that it had no duty to bargain with the Unions, and accordingly dismissed the complaint [Jt. App. 54-62; Pet. App. 15-23]. 170 NLRB No. 92; 67 LRRM 1504. The Unions filed a petition with the Court of Appeals for

the District of Columbia to review and set aside the order of the Board. That Court (by Burger, Tamm, and Leventhal) unanimously affirmed the Board by denying the petition (Pet. App. 1-14). .... F. 2d ...., 71 LRRM 2150 (not yet officially reported). The Unions then filed their petition to this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT.

Under Section 8(a)(5) of the NLRA an employer has only the duty to bargain with the majority representative of his employees as their exclusive bargaining agent. Contrary to the allegations, the finding below was that Ehlers was not a successor to GM and hence the Unions were not the bargaining agents of Ehlers' employees. The Unions, therefore, have changed their position and now contend only that Ehlers, as a prospective purchaser from GM, had a duty to bargain with them relative only to the hiring of GM's employees.

The Unions' present claim was not an issue before the Labor Board and has not been litigated. Until the Petition herein was filed, the entire basis of the Unions' case, under the General Counsel's complaint, was that Ehlers violated Section 8(a)(5) by refusing to bargain with them as exclusive bargaining agent of Ehlers' own employees. Thus, the Petition should be denied on this ground alone.

On the merits of the Unions' argument, there is no conflict between the decision below and that of other courts of appeal or of this Court. On the contrary, there are decisions by five courts of appeals which sustain the decision below.

Thus, there is no undecided important question of federal law before this Court.

Section 8(a)(5) of the Act expressly imposes the duty to bargain on an employer only with the majority representative of his own employees. Hence, it does not impose any duty before the employer has acquired his employees or with reference to the employees of any other employer. The interest of GM's employees in employment is protected by Section 8(a)(3) of the Act, which prohibits a purchaser (or other employer) from refusing to hire them because of their union connections. Further, the design of the Act is that their job security can best be achieved by negotiations between their employer (GM) and the Unions. Such negotiations could even result in an agreement that the facility would not be sold or that the agreement of sale require the purchaser to hire the employees. But the Act would have to be amended to require the purchaser to bargain, even on a limited basis, with a union that is the majority representative of the seller's employees but not of the purchaser's employees.

Finally, there was not here the continuity of business purpose which, according to the Unions, is what creates the duty of the purchaser. The business purpose of a manufacturer, such as GM, was basically dissimilar from that of a small, independent dealer, such as Ehlers.

Accordingly, the petition should be denied.

REASONS FOR DENYING THE PETITION.

We submit there is no merit to the petition herein and the same should be denied on each of the grounds hereinafter stated. The length of our discussion, which is only necessary because of the complexities of the NLRA, should not mislead the Court into assuming there is any substance to the Unions' argument.

I.

THE QUESTION POSED BY THE PETITION IS NOT, AND HAS NOT BEEN, AN ISSUE IN THIS CASE.

Assuming that there is merit to the Unions' contention that a purchaser may in some circumstances have a duty to bargain with the union representing the sellers' employees relative to possible hiring of the seller's employees, such a contention was not raised, and was not an issue, in this case. There was no breach of any such duty alleged in the General Counsel's complaint. The complaint alleged [¶ 34] that Ehlers had been since June 1, 1965 the successor to GM's Wilshire operation, that since such date the Machinists had represented a majority of Ehlers' employees in a unit of mechanics and other shop employees, that Ehlers had refused to bargain with the Machinists "as the exclusive collective-bargaining representative of its employees in the appropriate unit described" with reference to wages hours, etc., and that Ehlers, by such refusal, violated Section 8(a)(5) of the Act [Jt. App. 344, 349, 350]. There were similar allegations concerning the Painters with reference to the painters employed by Ehlers [Jt. App. 352, 353].

Thus the alleged violation by Ehlers was its failure to bargain with the Machinists (and Painters) as the

exclusive bargaining agent of Ehlers' mechanics, etc. (and painters). There was absolutely no allegation of any sort that Ehlers had any obligation of any kind to bargain with reference to GM's employees.

As observed by Judge Leventhal in his concurring opinion in the Court of Appeals [Pet. App. 13]:

> "4. In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motor's employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.
>
> "This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force. . . ."

Since there was no such allegation, the hearing before the Labor Board did not involve any claim that Ehlers had any duty to bargain relative to the hiring of GM employees, so such a contention was not litigated. In their contrary assertion (Pet. 21) the Unions merely cite the record reference to the correspondence between the Unions and Ehlers. In this respect, in none of their oral or written communications did the Unions assert that Ehlers had any such duty nor did they demand or request that Ehlers bargain with them about the hiring of GM's employees [Jt. App. 642-648, 1131-1133].

As a matter of fact, the position of the Unions initially and consistently was that Ehlers was a successor

to GM, that as such such successor GM's union contract was binding on Ehlers and the Unions were the bargaining agents of Ehlers' employees, and that under the Unions' contract Ehlers was obligated to hire all GM's Wilshire unit employees. Thus, at the NLRB hearing the Unions' counsel stated, "the theory of our case initially and still is that we are the bargaining agent, because there is a successorship here" [Tr. 110]. In the State Court proceeding, the Unions sought to compel arbitration of its claim that the GM's union contract was binding on Ehlers and that, therefore, the termination of the GM employees was a breach of that contract by Ehlers and also prayed that pending arbitration Ehlers be ordered "to reinstate upon request, all employees who were terminated on May 28, 1965 to the same or substantially equivalent positions held by them prior to said date and grant them full seniority rights" [Jt. App. 113].

Thus, at no time, prior to the Petition herein, did the Unions claim that Ehlers had any duty to bargain with them other than as the exclusive bargaining agent of Ehlers' employees. The contention, now made for the first time, that Ehlers had a limited duty to bargain with the Unions as the bargaining agent of GM's employees concerning the possible hiring of GM's employees was not an issue before the Labor Board or the Court of Appeals, was not litigated, and is not, under these circumstances, properly before this Court for consideration. Hence, the Petition must be denied on this ground alone, regardless of the merit of the Unions' contention relative to the status of the law on such an issue.

II.

THE DECISIONS BELOW ARE CONSISTENT WITH ALL JUDICIAL PRECEDENT DURING THE THIRTY-FOUR YEARS OF THE ACT.

Contrary to the assertion of the Unions (Pet. 23), the decisions of the Board and the reviewing court are consistent with all precedents under the NLRA since its enactment over thirty-four years ago. In the following decisions the employer was held not to be a successor and therefore not guilty of violating Section 8(a)(5) of the Act by refusing to bargain with the union. *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959); *Piasecki Aircraft Corp. v. NLRB*, 280 F. 2d 575 (3rd Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *NLRB v. Aluminum Tubular Corp.*, 299 F. 2d 595 (2nd Cir. 1962); *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833 (9th Cir. 1964). The instant decision is consistent with each of the foregoing cases and could not have been decided any other way without having been in direct conflict with the *Alamo* and *Stepp's* cases.

The decisions of a fifth court of appeals similarly require an affirmance of the decision below. *NLRB v. Downtown Bakery Corp.*, 330 F. 2d 921 (6th Cir. 1964); *cf. NLRB v. Richard W. Kaase Co.*, 346 F. 2d 24 (6th Cir. 1965). In the *Downtown* case, involving a successorship, it was held that there was not a Section 8(a)(5) violation since majority status of the union was not established by proof only that it had been bargaining agent in a larger multi-employer unit including the predecessor employer. All the other decisions finding successorship and/or a refusal to bargain violation are clearly distinguishable. The Supreme Court has not considered any case in point.

The contention of the Unions that a purchaser of a part of the assets of a business, or of an entire business, has any duty to bargain with the union representing the seller's employees concerning the hiring of such employees is without any judicial support of any kind whatsoever. The cases relied upon by the Unions (Pet. 15-23) did not even involve a purchaser situation, with but two exceptions. In other words, each of them concerned the bargaining duty of an employer with the exclusive bargaining agent of his employees with reference to such employees. The passages quoted must be read in the light of this basic fact.

Thus, in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 204 (1964), at the outset this Court stated, "This case involves the obligation of an employer and the representative of his employees under §§ 8(a)(5), 8(d), and 9(a) of the National Labor Relations Act." . . . The Court merely held that the employer had a duty to bargain with such representative relative to its decision to terminate its own employees by subcontracting. The case of *Westinghouse Elec. Corp.,* 150 NLRB 1574 (1964) involved the same matter. *NLRB v. Royal Plating & Polishing Co.,* 350 F. 2d 191 (3rd Cir. 1965) concerned the duty of the employer to bargain relative to the termination of his own employees on closing one plant and in *Cooper Thermometer Co. v. NLRB,* 376 F. 2d 684 (2nd Cir. 1967) relative to the transfer of his own employees on relocation of the plant.

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) and *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967) involved discrimination by an employer between its strikers and nonstrikers in violation of Section 8-

(a)(3). This, in turn, was related to the definition of "employees" in the Act as including strikers. As observed in the *Fleetwood Trailer* case (p. 378):

> "Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U.S.C. §§ 157 and 163). Under §§ 8(a)(1) and (3) (29 U.S.C. § 158(1) and (3)) it is an unfair labor practice to interfere with exercise of these rights. . . ."

The case of *K. B. & J. Young's Super Markets, Inc. v. NLRB*, 377 F. 2d 463 (9th Cir. 1967) *cert. den.* 389 U.S. 841 (1967) (Pet. 18) is here inapplicable as also involving discrimination in violation of Section 8 (a)(3), although the sale of a business did take place. The purchaser there induced the seller of a chain of meat markets to discharge its employees so that the purchaser could evade and escape its obligations as a successor to recognize the union as bargaining agent and to avoid the applicablility of an existing union contract to the acquired markets. The complaint alleged, and the Board found, that the purchaser thereby had violated Section 8(a)(3) of the Act. Thus, the court, at page 465, distinguished its earlier decision in *NLRB v. John Stepp's Friendly Ford, Inc.*, 388 F. 2d 833 (9th Cir. 1964) on the ground that in this case, "pe-

titioner [Young's] caused the mass discharge of unit personnel for anti-union reasons." So, Young's was ordered to employ the discriminatees.

The facts in the instant case are entirely different [¶¶ 10, 11, 20-22]. The Unions' original unfair labor practice charges did include a claim of a violation of Section 8(a)(3) in the failure of Ehlers to hire all the GM employees [Jt. App. 328, 335-336]. But the Regional Director, after investigation, found no merit in this claim, so that the amended charges of November 17, 1965 [Jt. App. 329-330, 337-338], upon which the General Counsel's complaint of the same date was based, did not contain any such allegations [Jt. App. 340-357]. Further, GM discharged its employees without Ehlers making any request, or even a suggestion, that it do so [Jt. App. 143, 145, 153, 156, 161, 168, 431, 992, 995]. And there was no evidence contrary to the Board finding that Ehlers hired its employees on the basis of skill and ability without reference to union sympathies or connections [Jt. App. 58-59, 806].

The split decision of the Board in *Chemrock Corp.*, 151 NLRB 1074 (1964) is clearly distinguishable from the instant situation. Chemrock was indisputably a successor. It took over the operations of the seller lock, stock and barrel, including the employees and supervision, without change, and recognized the Machinists, which represented the production and maintenance employees of the seller, as bargaining agent. The Company had also planned on hiring as a group the seller's five truck drivers, represented by the Teamsters. Only when those drivers demanded that Chemrock accept their union contract and deal through their Teamster representatives did the company refuse to hire them. The de-

cision was limited solely to (p. 1080, n. 8) "circumstances such as those described above." The limited application of *Chemrock* was demonstrated by the number of Board decisions subsequent thereto wherein it was held that a purchaser did not have a duty to bargain even though it did not hire all the seller's employees.

In neither the *K. B. & J. Young's* or the *Chemrock* case was there any suggestion that a purchaser has any duty to bargain with the seller's union relative to hiring the seller's employees.

The only opinion the Unions cite which even has any bearing on their contention is the concurring opinion of Judge Leventhal in the Court below (Pet. App. 7-14). Judge Leventhal expressed his thoughts "with some diffidence" only to "help others in the delineation of their thoughts" and did not purport to express any positive views concerning a possible preliminary bargaining relationship (Pet. App. 8). This is understandable since, as the Judge draft p. 22 concluded (*supra,* page 23), the instant case did not involve such a matter and was not argued. While there was some question asked from the bench pertaining thereto at the oral argument, counsel for the intervenors were each limited to five minutes within which to make their entire argument.

In each of the cases of *NLRB v. Alamo White Truck Service, Inc.,* 273 F. 2d 238 (5th Cir. 1959), *Piasecki Aircraft Corp. v. NLRB,* 280 F. 2d 575 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961), and *NLRB v. John Stepp's Friendly Ford, Inc.,* 338 F. 2d 833 (9th Cir. 1964) it was held there was no Section 8(a)(5) violation in view of the absence of a successorship, although in each of them complaint was made about the failure of the purchaser to hire all the seller's employees.

In the *Piasecki* case, the union specifically requested the purchaser to discuss with it the hiring of the seller's employees with their seniority under its contract with the seller.

Thus, there is no authority that a purchaser of a business has any duty to bargain relative to the hiring of the seller's employees. As a matter of fact, during all the years of the National Labor Relations Act (including the Wagner Act) few, if any, purchasers have ever done so. The Unions should have been more frank in pointing out that they are urging a change in the law as it has been applied since the 1935 enactment of the Act. Consequently, the Unions' assertion (Pet. 23), as one of two reasons for granting the petition, that the decision below is "in conflict with applicable decisions of this Court and of the Second, Third, and Ninth Circuits" simply is not true.

III.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED BY THE PETITION.

One of the two grounds urged by the Unions as the reason why the Petition should be granted is the assertion that "an important question of Federal law (is) presented in this petition" (Pet. 23). We submit this is not so.

It is doubtful that the alleged question is an "important" one. Nothing was presented by the Unions to demonstrate this. Actually, while obviously important to the parties, the alleged question cannot be considered a significant one in the entire scheme of the complex NLRA.

Moreover, the present issue does not involve an undecided question (unless the Unions are asserting that

every issue under the NLRA not decided by the Supreme Court is unresolved). As demonstrated above, in our discussion of the asserted conflict among the circuits, the law in this respect has been settled for years. These prior decisions, as we shall now discuss, were clearly in accordance with the mandate of the Act.

IV.

THE ACT IMPOSES NO DUTY ON A PURCHASER TO NEGOTIATE WITH THE BARGAINING AGENT OF THE SELLER'S EMPLOYEES.

A. An Employer Need Bargain Only With the Representative of His Employees.

The Unions assert Ehlers had a duty to bargain with respect to "retention" of the work force. Despite their careful avoidance of such terminology (Pet. 18), what the Unions are claiming is that Ehlers had a duty to bargain about the GM employees it should hire. Although the Unions seek to ignore the fact, Ehlers was a distinct and different entity from GM. This was not an *alter ego* situation [¶ 28]. Ehlers was just starting in business. Hence it was necessary for Ehlers to *hire* employees for the first time. Thus, with respect to Ehlers, the individuals it hired, including former GM employees, were new employees of a different employer [¶¶ 10, 11, 21, 22, 24].

The Unions go even further and assert Ehlers had a duty to bargain with them before it was even an "employer" under the Act. Thus, the Unions insist that the date of "succession" by Ehlers was May 12, 1965 (Pet. 12), a contention that is inconsistent with the findings of the Board. That was the date Lou Ehlers entered into the buy and sell agreement with GM [¶

15]. The Unions' contention is that Ehlers thereafter became obligated to bargain with the Unions on May 20, 1965, the date the Unions first approached Ehlers [¶ 29]. But as of that date, Ehlers did not even have any employees.

In any event there could have been no "succession" until June 1, 1965. That was the date Ehlers first began its business [¶ 23], having hired its employees the few days immediately preceding [¶¶ 21, 22]. The buy and sell agreement was not effective until then. Its effectiveness was conditioned upon Ehlers qualifying for and being issued a Cadillac dealer's franchise [Jt. App. 441, 528]. And this did not happen until June 1st [Jt. App. 140-141]. And GM continued its operations through May 28th [Jt. App. 143, 145, 170]. Hence, up until June 1st Ehlers was merely a possible purchaser.

This situation in itself suggests the absurdity of the Unions' contention. According to the Unions, Ehlers had a duty to bargain with them merely because of the possibility (or probability) it would be issued a Cadillac franchise, purchase some of GM's assets, and engage in business at a location where GM had been conducting part of its Los Angeles Cadillac retail branch operations.

Section 8(a)(5) was not designed to apply to any such kind of a situation. The bargaining duty applies only to an *employer,* and then only with reference to the exclusive bargaining agent of *his* employees. *Piasecki*

Aircraft Corp. v. NLRB, 280 F. 2d 575, 589 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961).[6] Thus, Section 8(a) provides [29 U.S.C. § 158(a)]:

> "It shall be an unfair labor practice for an *employer*—* * *
>
> (5) to refuse to bargain collectively with the representatives of *his* employees, subject to the provisions of Section 9(a)" (emphasis added).

Section 9(a) provides that such representative is the exclusive bargaining agent for all such employees. It reads [29 U.S.C. § 159(a)]:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

That an employer need bargain only with the representative of his own employees is confirmed by another provision of the Act. The NLRA was amended by the Labor Management Relations Act of 1947 (the so-called Taft-Hartley Act) to impose a correlative duty to bargain upon the employees' representative. Section 8(b) provides [29 U.S.C. § 158(b)]:

> "It shall be an unfair labor practice for a labor organization or its agents—* * *

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[6]The case of *U.S. Pipe & Foundry Co. v. NLRB*, 398 F. 2d 544 (5th Cir. 1968), cited in the concurring opinion below of Judge Leventhal (Pet. 9), did not involve the duty to bargain. In this respect it should be noted that it is only in subsection (5) of Section 8(a) that the prohibition is applicable to the employer's own employees ("his") as distinguished from employees generally.

(3) to refuse to bargain collectively with an *employer,* provided it is the representative of *his* employees, subject to the provisions of Section 9-(a)" (emphasis added).

Thus, a union likewise has the duty to bargain only with the employer of the employees it represents.

The design of the Act, then, is that a union designated by a majority of the employees in an appropriate unit is the exclusive representative of all the employees in the unit and the employer of such employees has the duty to bargain with such union and to refrain from bargaining with the employees or any other union and the union has a duty to bargain with such employer with reference to his employees.

It is true that in some situations an agreement between an employer and a union (that is not the exclusive bargaining agent) with reference to the union's members only who are employed by that employer—a so-called "members only" contract—may not be illegal. But here the Unions claim a duty to bargain with reference to its members who are not employees of Ehlers. Even assuming Ehlers could legally have bargained with the Unions relative to hiring their GM members, it would have had no duty to do so. Under Section 8-(a)(5), the only duty is that to bargain with the exclusive representative of the employer's employees. Hence, from the beginning it has been recognized under the Act there is no duty to bargain with a union (with reference to its members only, or otherwise) that is not such exclusive bargaining agent. *Mooresville Cotton Mills,* 2 NLRB 952, 955 (1937).

Prior to June 1st, the date Ehlers began operations and first had employees on its payroll, Ehlers could have

had no duty to bargain. From and after June 1st, the Unions were not the representatives of Ehlers' employees, as the Board found, which finding is not challenged by the Unions. Since the Unions were not at any time the representatives of Ehlers' employees, it at no time had any duty to bargain with them under Section 8(a)(5) of the Act.

The soundness of this analysis is demonstrated by the inadequacy of a limited duty to bargain. According to the Unions, Ehlers had a duty to bargain with them solely as to which of the GM employees it would agree to hire (Pet. 2, 18). Yet, under Section 9(a), the bargaining duty extends to "rates of pay, wages, hours of employment, or other conditions of employment." Hence, if there is a duty to bargain at all, it extends to the entire facet of the employment relationship, not just hiring.

And any bargaining about hiring alone would be meaningless. Obviously, the Unions would have to seek an agreement at the same time about the wages the GM employees would receive upon hire by Ehlers, their hours of work, and so on. The Unions would certainly press for a recognition of the length of service of such employees with GM, and unless the understanding included some prohibition on discharges any commitment about hiring could easily be frustrated. In short, there cannot be meaningful bargaining on a restricted basis, limited to the question of who would be hired. This is not the kind of bargaining envisioned by the duty imposed under the Act and it would be completely unrealistic and impractical.

In the instant case, moreover, it is difficult to understand what such limited bargaining could possibly ac-

complish. Ehlers found it necessary to hire only the most skilled and careful workmen. In selecting the employees of GM to be possibly hired, Lou Ehlers necessarily had to, and did, rely upon the judgment of GM shop supervision, the men who knew the qualifications of the employees best. And he hired everyone that they recommended [¶¶ 21, 22]. In the limited time Ehlers had available to recruit its work force, Lou Ehlers obviously could do no different, regardless of any possible protestations or representations by union officials.

Though Ehlers did not bargain with them, the Unions were not precluded from presenting to Ehlers, orally or in writing, whatever facts or information they might have thought would be persuasive to Ehlers in selecting GM employees. They did not do so because they were aware of the necessity of Ehlers relying on the judgment of GM's supervision and because, in any event, it was the Unions' position Ehlers had to hire all GM's employees before it hired anyone else.

Finally, collective bargaining under the Act is expected to be meaningful because of the availability of the strike, lockout, or other economic pressures to induce agreement. Yet, in the situation here involved the Unions could hardly put pressure on Ehlers by calling a strike of GM employees. This serves to point up how the Act was not designed to require an employer to bargain concerning some other company's employees. Thus, since the Unions were not at any time the representatives of Ehlers' employees, Ehlers had no duty to bargain with them under Section 8(a)(5) which imposes a duty to bargain only with the exclusive representative of the employer's own employees.

B. A Contract to Hire Union Members Is Prohibited by the Act.

The purpose of bargaining is to reach an agreement. Thus, the Unions are asserting that Ehlers had a duty to enter into a contract with them about the hiring of their members employed by GM. Since the Unions were not the exclusive bargaining agents of Ehlers' employees, such an agreement, we submit, would be illegal under the Act.

Pre-hire union agreements have always been held illegal under the Act. *Frick Co.*, 141 NLRB 1204 (1963). Subsection (f) was added to Section 8 of the Act by the Labor-Management Reporting and Disclosure Act of 1959, the so-called Landrum-Griffin Act [29 U.S.C. § 158(f)], to make such pre-hire agreements legal—but only in the building and construction industry! Only in such industry is such an agreement legalized, notwithstanding "the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement."

Except in building and construction, Section 8(a)(3) of the Act [29 U.S.C. § 158(a)(3)] is applicable in its entirety. Thereunder it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This provision requires that an employer remain neutral in the hiring of employees between those who may be union members or have union connections or sympathies and applicants who may not be union members or may even be anti-union.

There can be no doubt that if an employer had a duty to bargain with a union (not the representative of his employees) about hiring, this would encourage workmen to affiliate with that union. Such an agreement for preferential hiring would discriminate against non-union applicants and would encourage membership in the union. Thus, it would violate Section 8(a)(3). And this would be true even if it was not the employer's purpose or intent to so discriminate. *Radio Officers' Union of Comm. Telegraphers v. NLRB,* 347 U.S. 17 (1954).

Nor is there anything in Section 8(a)(3), or the decisions under it, which allows any distinction because the employer may be a purchaser from a unionized seller. And so, in *NLRB v. Tennsco Corp.,* 339 F. 2d 396, 398 (6th Cir. 1964), with reference to an accusation that a purchaser violated Section 8(a)(3) by failing to hire a number of the employees of a seller whose employees were represented by a union, the court commented:

> ". . . Was Tennsco obligated to hire only union members? It hired fourteen union members. Was it obligated to complete its roster with union members? This was a new corporation. It had as yet no contract with a union. Would not a compulsory all-union hiring have been an illegal closed shop?"

It is certainly inconsistent with Section 8(a)(3) to contend that a purchaser has a duty to bargain with the seller's union about hiring of the union's members and thereby give preference to such union members. Thus, the Unions' position conflicts with Section 8(a)(3) of the Act.

C. The Employment Security of a Seller's Unionized Employees Is Adequately Protected Though the Prospective Purchaser Has No Duty to Bargain.

1. Legislative Protection.

The Unions argue that employment is of prime concern to a workingman. This goes without saying. But it does not follow, as the Unions contend, that the interest in continuity of employment must be protected by a bargaining duty of a prospective purchaser.

In this respect, before the Labor Board and the Court of Appeals the Unions relied extensively on *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964). That case, however, involved Section 301(a) of the Labor-Management Relations Act of 1947 [29 U.S.C. § 185(a)] and the enforceability of an arbitration clause pursuant to the national policy favoring arbitration. Applying that decision, the State court, in the Unions' action against Ehlers, refused to order arbitration [Jt. App. 128-129]. *Cooksey v. Lou Ehlers Cadillac,* 63 LRRM 2425 (Calif. Supr. Ct., 1966).

Relative to the protection of the interests of GM employees, in *Wiley* the Court was concerned with "a duty to arbitrate previously established" and the Court cautioned, at page 551, that its opinion had no application to the duty to bargain. The inapplicability of the *dictum* at page 549 to the instant situation is demonstrated by the later case of *Textile Workers Union of America v. Darlington Mfg. Co.,* 380 U.S. 263 (1965). Notwithstanding the *dictum* in *Wiley* that the rightful prerogative of owners to "even eliminate themselves as employers" should be balanced by "some protection to

the employees from a sudden change in the employment relationship", this Court held that the NLRA did not limit an employer's absolute right to discontinue its entire business or, for nondiscriminatory reasons, a part thereof. No protection to the employees relative to their jobs was provided by the NLRA. This decision, which was under the NLRA, whereas *Wiley* was under Section 301(a) of the Taft-Hartley Act, is directly contrary to the Wiley *dictum.*

Congress has attacked the problems of unemployment by a different approach. Thus, it has prohibited discrimination in hiring and employment generally on the basis of race, sex, and age by Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-2000e-14] and by the Age Discrimination in Employment Act of 1967 [29 U.S.C. §§ 621-634]. It has provided a program of pensions and unemployment insurance. Titles II and III of Social Security Act [42 U.S.C. §§ 401-425, 501-503]. Specifically with reference to possible loss of employment as a result of a railroad merger, Congress has provided for additional protection. Section 5(2)(f) of Interstate Commerce Act [49 U.S.C. § 5(2)(f)]. It has, however, except in the railroad situation, deemed it inadvisable to make special provision for possible loss of a job arising out of the closing of a plant or sale of a facility.

2. NLRA Section 7.

While there may be a basic right to work, this is not a right protected by Section 7 of the NLRA, as the Unions contend (Pet. 17), and none of the decisions cited by them so state. There is no reference whatsoever therein to employment except to the extent it recognizes the validity of a union membership requirement.

The Section also recognizes the "right to refrain" as of equal dignity with the right to engage in the protected activities.

Also, with reference to the right to work, this is just as much a concern to the individuals Ehlers hired who had not been working for GM as it was to the GM employees. In all probability employment to the non-GM employees Ehlers did hire was of greater urgency to them than it was to the GM employees in view of the termination benefits the GM employees had, as discussed below. Thus, it cannot be said that the GM employees had greater equity in any desire to be hired by Ehlers than did the other employees Ehlers hired. It is unthinkable that it would be the policy of the law to favor the one group of workers over the other. The *Wiley* opinion makes no such suggestion, although recognizing the protection provided by contract. Yet the Unions' contention amounts basically to a claim that its members employed at GM were entitled to some preference in employment by Ehlers over other applicants.

3. NRLA Section 8(a)(3).

The interests of the GM employees in employment after termination by GM is given a measure of protection by Section 8(a)(3) of the NLRA [29 U.S.C. § 158(a)(3)] which precludes Ehlers or any employer, including a purchaser from or successor to GM, from refusing to hire any of them because of their union membership or sympathies, if any. That Section effectively prohibits an employer from refusing to hire any individual (including terminated employees of a unionized seller) because of union sympathies or membership, and the Board has been aggressive in enforcing

such provision. *K. B. & J. Young's Super Market, Inc.*, 157 NLRB 271 (1966) *enf'd* 377 F. 2d 463 (9th Cir. 1967) *cert. den.* 389 U.S. 841 (1967); *Piasecki Aircraft Corp.*, 123 NLRB 348 (1959) *enf'd* 280 F. 2d 575 (3rd Cir. 1960) *cert. den.* 364 U.S. 933 (1961); *T.I.L. Sportswear Corp.*, 131 NLRB 176 (1961) *enf'd* 302 F. 2d 186 (D.C. Cir. 1962).

By the same token, as discussed above, it prohibited Ehlers from favoring union members in its hiring policies.

4. NLRA Section 8(a)(5).

Assuming the validity of all the Unions' arguments about the importance of collective bargaining in protecting employees from unemployment (and this is their only argument), the Unions still have not made a case for requiring a purchaser to bargain with the seller's union. The design of Section 8(a)(5) of the Act is that protection of the workingman relative to employment and other vicissitudes will be best achieved by collective bargaining between the exclusive representative of a group of employees and their employer. This means, of course, that GM had such a duty, and not Ehlers.

Because GM had no power to hire Ehlers' employees, the Unions' argument is based upon the assumption that unless Ehlers had some duty to bargain with them relative to such hiring they have no effective means of protecting their members. The Unions' assumption, however, is erroneous.

The Unions were free over the years to negotiate with GM contract provisions to protect their members fully, assuming they had sufficient bargaining power.

Thus, they could have negotiated commitments that employees not be discharged (except for misconduct) or that they be guaranteed employment for the full term of the contract. They could have sought a provision that GM not dispose of the agency covered by the contract, or that it not do so without the Unions' approval or unless GM required any purchaser, as a condition of the sale, to hire all the GM unit employees and/or assume the union contract. Such terms are found in numerous collective bargaining agreements.[7] Thus, the Machinists had successively negotiated clauses in contracts with other employers providing [R.E. Exh. 11, Exh. "B", ¶¶ f, g]:

> "The parties agree that in the event that the ownership or management of the Company's plants or Company is changed by sale, merger, or in any other manner, this Agreement shall be included as a condition of such change or transfer."

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[7]See generally R.E. Exhs. 11 and 12. Typical union contract clauses are the following:

"If the employer shall sell, transfer, or otherwise dispose of its business . . ., the agreement by which such sale . . . is made shall provide that the person thereafter to operate the business shall assume all of the terms and conditions of this agreement and shall specifically agree to retain in his employ all members of the union then employed in the business" [R.E. Exh. 12, Exh. "B", ¶ 51,803.10].

"In the event of any change in the ownership, management or operation of the plant or facilities covered by this agreement by sale . . . or otherwise, the Company agrees that it will make it a condition of such sale . . ., and provide in the instrument effecting the same, that the purchaser . . . shall be fully bound by all the terms and conditions of this agreement. . . ." [R.E. Exh. 12, Exh. "A"].

". . . In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer . . . shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement" [1 *BNA Col. Barg. Neg. & Cont. Serv.* p. 30:3. See also *Ibid.* p. 70:182].

Such contract provisions are, of course, specifically enforceable. *Cf. International Union, United Auto etc. Workers, Local 391 v. Webster Elec. Co.*, 299 F. 2d 195 (7th Cir. 1962); *Local Division 1098, Amalgamated Ass'n, etc. v. Eastern Greyhound Lines;* 225 F. Supp. 28 (D.C. 1963); *Coulon v. Carey Cadillac Renting Co.*, 231 F. Supp. 991 (S.D.N.Y. 1962); *International Union, United Auto, etc. Workers, Local 408 v. Crescent Brass & Pin Co.*, 46 LRRM 2975 (USDC E.D. Mich. 1960) (not officially reported).

The Unions did not seek or did not succeed in achieving such contractual protection from GM for their members. However, they did obtain financial protection for their members in the event of a loss of job. This was in the form of a generous pension program, with a provision for early retirement [G.C. Exhs. 6-D, 6-K; see ¶ 11], and an income security plan (not unlike a severance pay program) which allowed cash payments on final termination of employment from GM [G.C. Exhs. 6-F, 6-M; see ¶ 11].

Moreover, faced with a GM decision during the contract term to discontinue operations at Wilshire, the Unions were again free to negotiate with GM about the effect of such action on its members. *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (3rd Cir. 1965) (Pet. 16); *NLRB v. Rapid Bindery, Inc.*, 293 F. 2d 170 (2nd Cir. 1961). As observed in the *Transmarine* case (p. 939):

> ". . . Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given an opportunity to bargain over the rights of the

> employees whose employment status will be altered by the managerial decision [citations omitted]. Such bargaining over the 'effects' of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority, and pensions, among others, which are necessarily of particular importance and relevance to the employees."

The Unions at the time of GM's announcement could have sought a GM agreement to require by the sales contract any purchaser to fill its shop employment needs by first hiring the GM workers. Failing that they could have insisted that GM negotiate to transfer any employee not hired by the purchaser to one of the numerous other GM facilities. *Cf. Cooper Thermometer Co. v. NLRB,* 376 F. 2d 684 (2nd Cir. 1967) (Pet. 15). Or they could have demanded that GM continue each employee's wages and monetary benefits until he found other employment or that GM make additional severance cash payments to accomplish the same objective. Or the Unions may have obtained GM's agreement to some other solution to the anticipated loss of employment.

Regardless of the terms of any such supplemental agreement with GM, the significant fact is that the design of Section 8(a)(5) is that whatever protection can be provided the employees faced with such a situation will result from negotiations between the current employer of such employees and their exclusive bargaining agent. Thus, the duty of the prospective seller to bargain about the effects of discontinuing the facility is envisioned as the meaningful vehicle to maintain the employment of the workers or to provide a

financial cushion against possible unemployment. So in such a situation the workers are not without recourse. And it is not necessary to impose any pre-hire bargaining duty on the purchaser. Congress has already taken care of the eventuality by the duty to bargain imposed on the seller.

GM informed the Unions early in January 1965 of its contemplated action and thereafter had a number of communications and meetings with the Unions relative to the effects of that decision [¶ 8]. GM did not refuse to consider any proposals the Unions cared to make concerning the anticipated termination of their members [¶ 9]. The Unions did not seek or obtain a GM agreement to transfer all the workers not hired by the purchaser or to incorporate in the sales agreement a condition that the purchaser hire the GM shop employees. Perhaps they did not press this matter for fear GM might decide to merely close its Wilshire branch and not seek a dealer to operate from that location. Certainly GM had enough dealers in the area that the retail sales of Cadillacs would not have been seriously lessened by such course of action.

But the fact that the Unions did not obtain an agreement from GM guaranteeing the continued employment of their members is not indicative that Section 8(a)-(5) must provide some additional means of protecting the members' jobs. On the contrary, the policy of the Act is to merely require the employer and the exclusive bargaining agent to bargain and to leave entirely to them whatever solutions, if any, they can mutually find. The Act is grounded on the expectation or hope the parties will arrive at a satisfactory, peaceful resolution. But if they fail to do so, the Labor Board may not

protect either party by imposing its own solution. *NLRB v. Insurance Agents Int'l Union,* 361 U.S. 477 (1960). The parties must then follow some other course outside of the NLRA including possible economic action.

It is not disputed that if GM had merely decided to close Wilshire, the Unions' members could only have such job protection as the Unions were able to get by a contract with GM, pursuant to GM's duty to negotiate relative to the effects of such closing. No reason exists why when a purchaser enters the picture (which enhanced the employment security of the GM workers because of the possibility of being hired by the purchaser) an additional and new duty to bargain (by the prospective purchaser) is necessary to further protect the GM workers.

In the instant situation the Unions apparently became dissatisfied with the protection for their members they had negotiated with GM. They actually filed unfair labor practice charges and a suit against GM [Jt. App. 104] which were dismissed by the Board and the court. They picketed Ehlers to no avail. They lost their court suit against Ehlers. The Board held Ehlers was not a successor to GM. So now they claim that Ehlers, as a naked corporation without any employees, had a duty to bargain with them, while they were the exclusive bargaining agent of GM's employees, about the hiring of the GM employees, even though they never made any demand that it do so.

There is absolutely no merit to the Unions' position. GM did have the duty to bargain, which it fulfilled. Ehlers would have the duty to bargain only when the Unions were the exclusive bargaining agent of Ehlers'

employees in an appropriate unit. The Board properly held they were not. That is the end of the case, just as all parties contemplated from the beginning if there was a finding of no successorship.

If an additional bargaining duty is to be added to the NLRA by requiring a prospective purchaser to bargain with the seller's union with reference to the seller's employees, this must be done by legislation because it involves a basic departure from the fundamental concept applied under Section 8(a)(5) for 34 years that the only duty to bargain is with reference to the employer's own employees. We submit "there is no justification for the drastic sort of judicial legislation that is urged" upon the Court by the Unions herein. *International Union, United Auto etc. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

V.

EVEN UNDER THE UNIONS' ERRONEOUS VIEW OF THE LAW, ITS CONTENTION IS INAPPLICABLE TO THIS CASE BECAUSE THERE WAS NOT A MAINTENANCE OF BUSINESS PURPOSE.

The Unions do not explicate just what kind of a purchaser, who is not a successor, has the duty to bargain with the union of the seller's employees. Judging from their heading (Pet. 15), the purchaser has such a duty if it "maintains a continuity of business purpose". Even if that proposition was sound law, it would have no application here.

While Ehlers sold new and used Cadillacs and had a repair shop, as did GM, its business purpose was basical-

ly dissimilar. GM was a manufacturer who sold its product at retail through its own store at Wilshire. Ehlers, on the other hand, purchased Cadillacs from GM and resold the same and also leased Cadillacs. Ehlers was in competition with all the other local GM franchised dealers and dependent solely upon its retail sales and service business for profit, neither circumstance being true as to GM [¶¶ 3, 23; and see R.E. Exh. 12, ¶ 3].

Thus, as observed by two members of the Board in their separate opinion (Pet. App. 22):

> "Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. I do not think this factor can be ignored. GM's Los Angeles sales outlets, unlike those of Respondents, were intimately tied in with its entire nationwide manufacturing and sales operations. . . ."

Similarly, as observed by Chief Justice Burger (then circuit judge) in the opinion below (Pet. App. 5-6):

> ". . . Even a cursory comparision of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, General Motors and unrelated, whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers.

> Thomas and Ehlers compete with each other for sales to customers while the General Motors managed enterprise was relatively indifferent in the sense that General Motors did not have the same interest in competing with franchise Cadillac dealers as do Thomas and Ehlers. As noted, management, accounting, and advertising were centrally controlled under the factory management but are totally separate and independent after the new franchise dealers took over. . . . attitudes on sales and performance which might have been tolerable to General Motors would not be acceptable to independent dealers."

In his separate concurring opinion Judge Leventhal observed (Pet. App. 7-8):

> ". . . As the majority opinion forcefully points out, there is significant difference in business objective between the independent Thomas and Ehlers dealerships, on the one hand, and the General Motors factory-affiliated service establishment on the other hand, and this a telling factor."

Judge Leventhal cited at this point *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959).

In the *Alamo* case the situation was identical to the instant case in one significant respect, and that is, the discontinuance by a large manufacturer of one of its own retail outlets and the purchase of assets used at that outlet by a new corporation which then became an independent dealer in the sale and service of the same trucks. In finding that the purchaser had no duty to

bargain with the union that represented the seller's employees, the court observed (p. 242):

> ". . . The employee-employer relationship in the operation of Alamo was materially different from the employee-employer relationship in White Motor Company, not just because of a difference in the number of employees or in the turnover, but because the interaction of the employee group with the management of Alamo was completely changed. We mean by this, the difference between the close personal relationship of management and workers characteristic of a small, local business, existing in this case as the record shows, and the disembodied relationship of workers to top management not uncharacteristic of a large corporation when branch workers must accept policies fixed by some far-off head office. . . ."

Thus, the *Alamo* decision, "turns on factual matters reflecting a basic change in the nature and function of the employing enterprise" [*Lloyd A. Fry Roofing Co.*, 176 NLRB No. 136 n. 7, 71 LRRM 1492 (1969)], and in this respect it is indistinguishable from the instant case.

Thus, even assuming there is some merit to the Unions' contention, the proposition of law they seek to establish would not apply to the instant case because of the essential difference in business purpose between GM and Ehlers.

CONCLUSION.

The Unions have not demonstrated that this case presents an issue of important federal law or that there is a conflict between the present decision and prior ones. On the contrary, 34 years of precedent under the NLRA establishes that Ehlers had no duty of any kind to bargain with the Unions. Moreover, the claim of a limited bargaining duty now urged by the Unions was not within the scope of the pleadings and was not litigated before the Board or the Court of Appeals. Accordingly, the Petition has no merit and should be denied.

Dated: August 18, 1969.

Respectfully submitted,

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